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[Third Party Communication:

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From: [REDACTED]

Sent: Tuesday, July 01, 2014 1:44:56 PM

To: [REDACTED]

Cc: [REDACTED]

Bcc:

Subject: Ex Parte question

This responds to your request for an opinion whether certain statements made to Appeals at a post-settlement conference violate the restrictions on *ex parte* communications contained in Rev. Proc. 2012-18, 2012-10 I.R.B. 455. For the reasons set forth below, the statements related made to Appeals are not prohibited *ex parte* communications.

Rev. Proc. 2012-18 prohibits *ex parte* communications between Appeals officers and other IRS employees to the extent that such communication appears to compromise the independence of the Appeals officers. See *also* IRM 8.1.10.1(1) (10-01-2012). An *ex parte* communication is a communication that takes place between any Appeals employee and another IRS function without the taxpayer/representative being given an opportunity to participate in the communication. Rev. Proc. 2012-18, Section 2.01(1). If the communication appears to compromise the independence of Appeals it is prohibited. Here, you and the exam employee(s) contacted Appeals to discuss a settlement decision with which you disagreed. Your stated intent was to inform the Appeals officer about documents and facts that would impeach the credibility of the taxpayer. You informed the Appeals officer your intent was to seek a reopening of the case because you believed the taxpayer lied and that such misrepresentations are grounds to seek a reopening under IRM 1.2.17.1.3 (1-05-2007) (policy statement that Appeals will not reopen a closed case unless it involved among reasons, fraud, concealment or misrepresentation of a material fact). See *also* IRM 8.6.1.6(2) (11-14-2013) (amplifying this policy and explaining that the reference to a closed case means one that is closed by a Form 870-AD or closing agreement).

Ordinarily, statements like these made outside the taxpayer/representative presence would be prohibited *ex parte* communications because you intended to influence Appeals regarding the taxpayer's credibility and accuracy of the facts. Rev. Proc. 2012-18, Section 2.03 (3). However, you made the statements at a post-settlement conference. A post-settlement conference may be held between an originating function (exam) and Appeals *after* the case is closed. IRM 8.1.10.3.1.4 (1)(6-21-12). Closed for *ex parte* purposes means, "Appeals rendered its decision in the case and issued the

necessary closing documents formalizing that decision, and no additional changes may be made by Appeals.” *Id.* Under Rev. Proc. 2001-18, Section 2.03(11) because the tax periods that are subject to the post-settlement conference are closed, “any discussion of the resolution of issues present in the closed periods *does not compromise the independence of Appeals*, and, thus, post-settlement conference between Appeals and Examination are permissible without giving the taxpayer/representative an opportunity to participate.” *Id.* (emphasis added). Here, to the extent your discussions about the taxpayer’s credibility, documents, and your intent to seek a reopening were limited to the closed period and have no effect upon open cycles, they are not technically prohibited *ex parte* communications. However, if your comments would impact upon open cycles, then you would be subject to the restrictions on *ex parte* communications. *Id.*

As noted, the period is “closed” if Appeals has rendered its decision and issued the necessary closing documentation, typically a Form 870-AD or closing agreement after which no additional changes may be made. In this case, your effort to reopen does not change the closed status of the decision. It should be noted that a post settlement conference is not the forum to seek to reopen the case. IRM 4.46.7.2.7.6 (1) (3-1-2006) provides the goal of a post settlement conference is to discuss the settlement’s impact on subsequent cycles. Specifically, subsection (3) provides, “This conference is not intended to be a critique of the settlement nor is it intended to replace LB&I’s dissent procedures. It is solely intended to communicate the resolution of the case to the examination team.” See *generally*, IRM 4.46.7.2.7.8 (12-29-2009) (explaining LB&I dissent procedures). However, under IRM 8.6.4.1.9(4) (12-17-2013), upon receipt of a dissent, the Appeals Director has the discretion to determine whether a reply is appropriate, and guided by existing policy, regulation, and statute, whether the case should be reopened.

To the extent that the Appeals decision stands, there is no technical *ex parte* violation. The taxpayer will have the benefit of the favorable settlement and will have suffered no prejudice or harm.

